STATE OF MICHIGAN

COURT OF APPEALS

GINGER OLDHAM,

Plaintiff-Appellee/Cross-Appellant,

v

BLUE CROSS & BLUE SHIELD OF MICHIGAN and DAVID BARTHEL,

Defendants-Appellants/Cross-Appellees.

UNPUBLISHED
June 8, 1999

No. 196747
Wayne Circuit Court
LC No. 94-407474 NO

Before: Holbrook, Jr., P.J., and Markey and Whitbeck, JJ.

PER CURIAM.

The trial court allowed plaintiff's claims for racial discrimination and handicap discrimination to go to the jury, which found against plaintiff on her claim of racial discrimination but for plaintiff on her claim of handicap discrimination. The trial court granted summary disposition in favor of defendants as to plaintiff's claims of invasion of privacy. We affirm.

I. Basic Facts And Procedural History

Plaintiff Ginger Oldham, an African-American woman, worked as a provider specialist for defendant Blue Cross & Blue Shield of Michigan ("BC/BS") under the supervision of defendant David Barthel. Plaintiff testified[1] that she began working at BC/BS in 1969. In 1981, she became a provider specialist in the field services unit. Between 1980 and 1988, she was generally rated well-qualified in her annual performance reviews. Plaintiff apparently got along well with her supervisor, Robert Ling, but Ling left at the end of 1989, and Barthel became her supervisor.

According to plaintiff, several months after Barthel took over, the atmosphere in the office became tense and hostile. Plaintiff testified that Barthel was condescending and demeaning toward her, "snappy and yelling just regularly." According to plaintiff, the problem became sufficiently severe that in June or July of 1991, she consulted a psychiatrist whom she had seen a number of years before for unrelated problems. The psychiatrist recommended that plaintiff enter the day hospital at Sinai's crisis center, but she did not follow this recommendation. In August of 1991, however, and several months

following what another witness described as a "major blow-up" with Barthel, plaintiff went to the crisis center and placed herself under the care of Dr. Sudhi Lingnurkar, a psychiatrist at the crisis center. Apparently during this process, someone telephoned Barthel and told him that plaintiff was in a hospital and would not be at work that week.

Dr. Lingnurkar testified that plaintiff said that she was being harassed, that she had difficulty with supervision at work for two years and that the stress was too much for her to handle. Dr. Lingnurkar also testified that, upon examination, plaintiff was angry and fearful, her speech was guarded and she exhibited regressive behavior. Dr. Lingnurkar diagnosed major depression and admitted plaintiff to the psychiatric unit. Later, in August of 1991, Dr. Lingnurkar called Barthel to let him know that plaintiff was still hospitalized and would not be at work that week; Barthel, however, testified that he did not know at the time that Dr. Lingnurkar was a psychiatrist or that the number he left was that of Sinai's crisis center.

Plaintiff was discharged from the Sinai crisis center in late August of 1991, but tried to commit suicide that night and was readmitted the next day. Plaintiff remained in the hospital for four days. She then entered the day hospital, attending daytime therapy for major depression full-time from September 1 through late October of 1991. During that time, Dr. Lingnurkar called Barthel at plaintiff's request to report that he was treating her. Dr. Lingnurkar also stated that, before December, his office received what he believed to be an inordinate number of telephone calls from BC/BS regarding plaintiff, which made him believe her claims that she was being investigated.

While plaintiff was out, several BC/BS employees became suspicious about the legitimacy of plaintiff's leave of absence because it coincided with the investigation of a complaint that one of these employees had made against plaintiff. In violation of company policy, these employees accessed plaintiff's records on the computer and found that she had been hospitalized with a psychiatric diagnosis. Thereafter, someone made an anonymous call to BC/BS's fraud and abuse unit and reported that plaintiff's leave of absence was not legitimate. The fraud and abuse unit investigated plaintiff and determined that her leave was legitimate. In late 1994, Barthel and other management personnel discovered the actions of the BC/BS employees in improperly accessing plaintiff's records and imposed discipline on those involved.

In late November of 1991, Dr. Lingnurkar anticipated that plaintiff would be able to return to work by the second week of December and he officially released her to return to work without restriction on December 16, 1991. At that time, according to Dr. Lingnurkar, plaintiff's condition was stable. When plaintiff returned to work, however, she and Barthel almost immediately had another confrontation. Plaintiff became very angry, and Barthel ordered her to leave the premises. When plaintiff did not, Barthel called a security guard. Barthel then called the Sinai crisis center and left a message for Dr. Lingnurkar to the effect that plaintiff had been escorted from the building, that people were afraid she might hurt herself and that she had been suspended.

Thereafter, plaintiff was examined by two independent medical examiners. The first, a Dr. Klarman, examined plaintiff on January 20, 1992, and found no evidence of mental illness and indicated that she could return to work, but suggested reassignment to another department would be

helpful. However, the second, a Dr. Norman Samet, examined plaintiff on January 31, 1992, and diagnosed acute paranoid psychosis with strong delusions of persecution by her supervisor and indicated that plaintiff was not fit to return to work.[2]

On January 22, 1992, the third-party administrator of BC/BS's short-term leave plan sent plaintiff a letter telling her to report back to work on January 23, 1992. Plaintiff testified that she was willing to return to work for BC/BS as a provider specialist but that she would "never again come back to work for David Barthel." In any event, plaintiff never again returned for work at BC/BS. Plaintiff's sick leave and short-term disability benefits ran out on February 1, 1992 and BC/BS then placed her on long-term disability ("LTD"); an employee on LTD is deemed to be on a leave of absence and is taken off the payroll. BC/BS sent plaintiff a letter to that effect on February 7, 1992.

Plaintiff filed this action in March of 1994, alleging claims for racial discrimination (Count I), handicap discrimination (Count II), intentional infliction of emotional distress (Count III), invasion of privacy (Counts IV and V), tortious interference with business relations (Count VI), and constructive discharge (Count VII). In December of 1995, defendants filed a motion to dismiss all claims under MCR 2.116(C)(7), (8) and (10). The trial court granted the motion as to intentional infliction of emotional distress (Count III), tortious interference with business relations (Count VI) and constructive discharge (CountVII). The trial court granted the motion as to invasion of privacy (Counts IV and V) as to Barthel but denied it as to BC/BS, finding that it was a question of fact whether the employees who accessed plaintiff's medical records were acting within the scope of their agency. The trial court denied the motion as to racial discrimination (Count I) and handicap discrimination (Count II).

In February of 1996, defendants filed a second motion to dismiss the invasion of privacy claim (Counts IV and V) under MCR 2.116(C)(4), alleging that if plaintiff's claim was that BC/BS was liable for an invasion of privacy committed by other employees within the scope of their employment, her sole remedy was to seek worker's compensation benefits, plaintiff having failed to allege an intentional tort as defined under the intentional tort exception. The trial court thereafter granted the motion, ruling that the defense was a jurisdictional issue that could be raised at any time and that the evidence did not establish an intentional tort as defined by statute.

Plaintiff's claims of racial discrimination (Count I) and handicap discrimination (Count II) were then tried before a jury. Defendants moved for a directed verdict, asserting, in part, that plaintiff had failed to establish a prima facie case of handicapper discrimination and therefore could not invoke the protections of the former Michigan Handicappers' Civil Rights Act, MCL 37.1101 *et seq.*; MSA 3.550(101), *et seq.* ("HCRA"), but the trial court denied this motion. The jury found against plaintiff on her claim of racial discrimination (Count I), but found for plaintiff on her claim of handicap discrimination (Count II). The trial court entered a judgment to that effect in April of 1996.

In May of 1996, defendants filed a motion for JNOV/new trial but the trial court denied that motion. Defendants appeal as of right from the judgment finding for plaintiff on the handicap discrimination claim (Count II), from the trial court order denying, in part, their motion for summary disposition and from the trial court order denying their motion for JNOV/new trial. Plaintiff cross-

appeals, challenging the trial court's order dismissing her claims for invasion of privacy (Counts IV and V).

II. Standards Of Review

A. Federal Preemption

The issue of federal preemption is one of jurisdiction and questions of subject-matter jurisdiction can be raised at any time, including for the first time on appeal. *Ass'n of Businesses Advocating Tariff Equity v Public Service Comm*, 192 Mich App 19, 24; 480 NW2d 585 (1991). Whether a court has subject-matter jurisdiction is a question of law that is reviewed de novo. *Smith v Union Charter Twp (On Rehearing)*, 227 Mich App 358, 359 n 1; 575 NW2d 290 (1998).

B. Summary Disposition

We review a trial court's ruling on a motion for summary disposition de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion:

> the trial court must consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. Summary disposition is appropriate . . . only if the court is satisfied that it is impossible for the nonmoving party's claim to be supported at trial because of a deficiency which cannot be overcome. [*Morganroth v Whitall*, 161 Mich App 785, 788; 411 NW2d 859 (1987) (citation omitted).]

C. Directed Verdict/JNOV

We review a trial court's ruling on a directed verdict motion de novo. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). In reviewing the trial court's ruling, "this Court views the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, grants that party every reasonable inference, and resolves any conflict in the evidence in that party's favor to decide whether a question of fact existed." *Hatfield v St Mary's Medical Center*, 211 Mich App 321, 325; 535 NW2d 272 (1995). A directed verdict is appropriate only when no factual question exists upon which reasonable minds may differ. *Meagher, supra*. Similarly, in reviewing a trial court's ruling on a motion for NJOV, we view the evidence and all legitimate inferences that may be drawn from it in a light most favorable to the nonmoving party. *Jones v Powell*, 227 Mich App 662, 676; 577 NW2d 130 (1998).

D. Rebuttal Evidence

We review a trial court's admission of rebuttal evidence for an abuse of discretion. *Nolte v Port Huron Area School Dist Bd of Ed*, 152 Mich App 637, 644; 394 NW2d 54 (1986). We

similarly review the trial court's decision on a motion for a new trial for an abuse of discretion. *Knight v Gulf & Western Properties, Inc,* 196 Mich App 119, 132; 492 NW2d 761 (1992). We will not reverse a trial court's decision on a motion for a mistrial absent an abuse of discretion resulting in a miscarriage of justice. *Schutte v Celotex Corp,* 196 Mich App 135, 142; 492 NW2d 773 (1992).

E. Invasion Of Privacy

"When reviewing a motion for summary disposition under MCR 2.116(C)(4), this Court must determine whether the pleadings demonstrate that the defendant was entitled to a judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact." *Faulkner v Flowers,* 206 Mich App 562, 564; 522 NW2d 700 (1994).

III. Federal Preemption

Defendants contend that the trial court erred in denying their motion for JNOV on the basis that plaintiff's handicap discrimination claim was preempted by § 301 of the Labor Management Relations Act ("LRMA"), 29 USC 185(a). We disagree. Section 301 preempts a claim based on state law only where the claim requires interpretation of a collective bargaining agreement. *Betty v Brooks & Perkins,* 446 Mich 270, 279; 521 NW2d 518 (1994); *Lowe v Ford Motor Co,* 186 Mich App 675, 678; 465 NW2d 59 (1991). State antidiscrimination statutes confer nonnegotiable rights on all employees independent of any collective bargaining agreement and claims under such statutes generally involve primarily factual determinations, such as the employer's conduct and motivation, and thus can be resolved without interpretation of the collective bargaining agreement. *Betty, supra* at 281-286; *Donajkowski v Alpena Power Co,* 219 Mich App 441, 447; 556 NW2d 876 (1996).

Plaintiff's complaint alleged that she was handicapped due to a mental characteristic and that Barthel harassed her when she returned to work because she had been on leave for psychiatric reasons. Plaintiff did not allege that she was discriminated against on the basis of a right or activity protected or governed by the collective bargaining agreement, but rather that she suffered a violation of her rights under the HCRA. The fact that defendants sought to justify their conduct or explain their motives with reference to actions permitted under the collective bargaining agreement does not alone transform plaintiff's claim into a federal contract dispute within the ambit of § 301. *Betty, supra* at 287-288; *Hall v Kelsey-Hayes Co,* 184 Mich App 277, 280-281; 457 NW2d 143 (1990). Similarly, the fact that the collective bargaining agreement includes a provision protecting employees from discrimination and provides a remedy therefor does not preempt a state law discrimination claim. *Betty, supra* at 289. Therefore, plaintiff's claim was not preempted by § 301 of the LMRA, the trial court did have jurisdiction over the claim and the trial court properly denied defendants' motion for JNOV on this ground.

IV. Summary Disposition

Defendants contend that the trial court erred in denying their motion for summary disposition as to plaintiff's claim of handicap discrimination. However, defendants have not addressed the arguments or evidence presented to the trial court at the time the motion was heard, but rely instead upon the

evidence presented at trial.[3] Accordingly, we decline to consider the issue because defendants have failed to properly support their position. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 175, 178; 568 NW2d 365 (1997).

V. Directed Verdict/JNOV

A. Elements Of A Prima Facie Case

Defendants contend that the trial court erred in denying their motion for a directed verdict or a JNOV because plaintiff failed to prove a prima facie case of handicap discrimination. To establish a prima facie case of discrimination under the HCRA, a plaintiff had to prove that she was "handicapped" as defined in the act, that the handicap was unrelated to the plaintiff's ability to perform the duties of a particular job and that the plaintiff was discriminated against in one of the ways set forth in the statute. *Stevens v Inland Waters, Inc*, 220 Mich App 212, 215; 559 NW2d 61 (1996).

B. Actual Handicap

To the extent plaintiff claimed that defendants discriminated against her on the basis of an actual handicap, we agree that she failed to establish a prima facie case. The alleged handicap was major depression, which constitutes a determinable mental characteristic resulting from a functional disorder. MCL 37.1103(e)(*i*)(A); MSA 3.550(103)(e)(*i*)(A). However, to constitute a handicap as defined in HCRA, the mental characteristic must substantially limit one or more major life activities, (e.g., caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working), *Stevens, supra* at 217, and must be unrelated to the plaintiff's ability to perform the duties of her job. MCL 37.1103(e)(*i*)(A); MSA 3.550(103)(e)(*i*)(A). Plaintiff's doctor testified that her depression limited a major life activity in that it prevented her from working at all. At that time, plaintiff's depression was related to her ability to perform the duties of her job and thus was not a handicap. Once plaintiff's doctor cleared her to return to work without restriction, it could be inferred that her condition was unrelated to her ability to perform the duties of her job. However, there was no evidence that her condition continued to substantially limit a major life activity and, thus, it was again not a handicap. Therefore, the trial court erred in denying defendants' motions for a directed verdict or a JNOV as to that aspect of plaintiff's claim.

C. Perceived Handicap

The HCRA not only prohibits discrimination against a handicapped person, but also prohibits discrimination against a person who, while not handicapped, is *perceived* as having a handicap. MCL 37.1103(e)(*iii*); MSA 3.550(103)(e)(*iii*); *Merillat v Michigan State University*, 207 Mich App 240, 245; 523 NW2d 802 (1994). As noted above, we must view the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, grant that party every reasonable inference and resolve any conflict in the evidence in that party's favor to decide whether a question of fact existed. *Powell, supra; Hatfield, supra*. The evidence showed that plaintiff was not handicapped when she returned to work. However, the evidence, when interpreted in the light most favorable to plaintiff, leads to the inference that defendants *believed* that plaintiff was mentally ill and unable to work

and that defendants suspended her on the basis of that belief. Such evidence was sufficient to support plaintiff's claim under the HCRA, *Merillat, supra* at 245-246, and therefore the trial court properly denied defendants' motions for a directed verdict or for JNOV.

VI. Rebuttal Evidence

Defendants contend that the trial court abused its discretion in denying their motions for a mistrial and a new trial based on the allegedly erroneous admission of a tape recording. The tape was properly authenticated by plaintiff's testimony. MRE 901(a), (b)(1) and (b)(5). The fact that it did not contain the complete conversation between plaintiff and a human resources director affected its weight, not its admissibility, and the director testified to the context in which the relevant issue was discussed. The tape was relevant in that it refuted the director's testimony regarding the relevant issue and the trial court reasonably determined that its probative value was not substantially outweighed by the danger of unfair prejudice. *Haberkorn v Chrysler Corp*, 210 Mich App 354, 361-362; 533 NW2d 373 (1995). Defendants' claim that the tape was altered was purely speculative, and defendants have not cited any authority in support of their claim that the tape was inadmissible because it was not produced during discovery. *Price v Long Realty, Inc*, 199 Mich App 461, 467; 502 NW2d 337 (1993). Therefore, defendants have not shown that the trial court abused its discretion in admitting the tape or in denying defendants' motion for a mistrial. *Schutte, supra; Nolte, supra*. Defendants have failed to preserve the issue regarding their motion for a new trial because they failed to provide the transcript from the hearing. *Brown v JoJo-Ab, Inc*, 191 Mich App 208, 210; 477 NW2d 121 (1991).

VII. Invasion Of Privacy

On cross-appeal, plaintiff claims that the trial court erred in granting defendants summary disposition of her claims for invasion of privacy. We disagree.

Plaintiff pleaded two claims for invasion of privacy: (1) intrusion upon seclusion; and (2) public disclosure of private facts. "An action for intrusion upon seclusion focuses on the manner in which information is obtained, not its publication; it is considered analogous to a trespass." *Doe v Mills*, 212 Mich App 73, 88; 536 NW2d 824 (1995). The elements of a prima facie case are: (1) the existence of a secret and private subject matter; (2) a right possessed by the plaintiff to keep the matter private; and (3) the obtaining of information about the matter through some method objectionable to a reasonable person. *Id*. The elements of a cause of action for public disclosure of embarrassing private facts are (1) the disclosure of information; (2) that the information is highly offensive to a reasonable person; and (3) that the information is of no legitimate concern to the public. *Id.* at 80.

Plaintiff's intrusion upon seclusion claim against Barthel alleged that he made telephone calls to her doctor, during the course of which he questioned the doctor's credentials, and accessed plaintiff's medical records through the computer system at work or directed other employees to do so. Assuming that Barthel made calls to plaintiff's doctor, in so doing he did not intrude upon plaintiff's seclusion. Cf. *Duran v Detroit News, Inc*, 200 Mich App 622, 630-631; 504 NW2d 715 (1993). Plaintiff does not cite any authority to show that accessing private medical information by computer is unreasonable. Assuming that it is, however, the evidence failed to show that Barthel actually accessed or directed the

access of such information from a computer. Therefore, the trial court properly dismissed plaintiff's invasion of privacy claims against Barthel.

Although not specifically alleged, plaintiff predicated her invasion of privacy claims against BC/BS on the action of her coworkers in accessing her medical information on the computer and disclosing it to others. The trial court dismissed the claims on the ground that they did not constitute an intentional tort as defined under the intentional tort exception to the exclusive remedy provision of the Workers' Disability Compensation Act, MCL 418.131(1); MSA 17.237(131)(1).

The statute defines an intentional tort as one where "an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury." MCL 418.131(1); MSA 17.237(131)(1). "[T]he phrase 'specifically intended an injury' means that the employer must have had in mind a purpose to bring about given consequences." *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 171; 551 NW2d 132 (1996) (Boyle, J., joined by Mallett, J.), 191 (Riley, J., joined by Brickley, C.J., and Weaver, J., agreeing with Justice Boyle's test for finding an intentional tort). "[W]hen the employer is a corporation, a particular employee must possess the requisite state of mind in order to prove an intentional tort. The intent requirement will not be fulfilled by presenting 'disconnected facts possessed by various employees or agents of that corporation . . . .'" *Id.* at 171-172 (Boyle, J.) (citation omitted). Because liability for an employee's actions is being attributed to the corporate employer, the acting employee must be in a supervisory or managerial capacity. *Id.* at 173-174.

Here, the employees who accessed plaintiff's medical records and disclosed their findings to others were not supervisors or managers. Further, the evidence was undisputed that Barthel and other managerial employees were not involved. Therefore, the evidence did not establish that *the employer* specifically intended to injure plaintiff. Thus, the trial court did not err in dismissing plaintiff's invasion of privacy claims against BC/BS.

VIII. Conclusion

We affirm the judgment of handicap discrimination on the basis of perceived handicap, the trial court's order denying, in part, defendants' motion for summary disposition, the trial court's order denying defendants' motion for JNOV/new trial and the trial court's order dismissing plaintiff's claims for invasion of privacy.

/s/ Donald E. Holbrook, Jr.
/s/ Jane E. Markey
/s/ William C. Whitbeck

[1] As outlined more fully below, plaintiff's counts of racial discrimination and handicap discrimination went to the jury. The references to testimony, therefore, are to the testimony given before the jury on these two counts.

[2] At trial, Dr. Lingnurkar opined that plaintiff's psychiatric condition was primarily due to her work environment and that it substantially limited a major life activity because she was unable to work. Defendants' first expert, Dr. Rosalind Griffin, a psychiatrist and the former medical director of the Sinai day hospital, examined plaintiff in September 1994. She concluded that, as of the date of her examination, plaintiff was not depressed and did not have a clinical psychiatric disorder, but she did have a paranoid personality disorder dating back to her teens. Because of the chronic nature of plaintiff's paranoid personality disorder, Dr. Griffin concluded that plaintiff's job did not cause the condition. Dr. Griffin agreed that plaintiff had been depressed in 1991, but believed the depression was due to the stress caused by her mother's illness, by her boyfriend leaving her and by being a single mother. Dr. Griffin also testified that plaintiff was unable to cope with that stress due to her paranoia and feelings of being persecuted at work and stated that because of her paranoid disorder, plaintiff was unable to return to work. Dr. Griffin observed that the paranoid disorder had not been diagnosed earlier, but noted that during her admission to the day hospital, plaintiff had repeatedly refused to submit to objective psychological tests. Defendants' second expert, clinical psychologist Edward Czarnecki, administered psychological tests to plaintiff in late 1994 or January 1995. He concluded that plaintiff had "a pervasive severe paranoid kind of orientation" that "is embedded within a personality structure that tends to be kind of vulnerable . . . to disturbance in the thought process, disturbance in the regulation of the emotions, kind of ego vulnerability in times of stress." Dr. Czarnecki opined that these characteristics were chronic.

[3] In this regard, we note that § 103 of the HCRA, MCL 37.1103; MSA 3.550(103), formerly defined a handicap to include in pertinent part "a determinable physical or mental characteristic of an individual [which] . . . is unrelated to the individual's ability to perform the duties of a particular job or position," and defined a mental characteristic as "limited to mental retardation which is significantly subaverage general intellectual functioning and to a mentally ill restored condition." The statute was rewritten in 1990 to add the requirement that the physical or mental characteristic must substantially limit a major life activity and to delete the definition of mental characteristic. Neither the trial court nor the parties seemed to realize this then, and the parties have not addressed that oversight on appeal. Given that defendants did not rely on the HCRA as amended, that the trial court apparently allowed plaintiff to

change her theory to include a claim that defendants discriminated against her on the basis of a *perceived* mental handicap when she returned to work and that, as noted above, defendants have not challenged the trial court's ruling on the motion for summary disposition on the basis of the evidence submitted in support of and in opposition to the motion itself, we decline to set the trial court's denial of summary disposition aside on the basis of the change in the statute.